

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 4642

IN THE MATTER OF:

Served August 9, 1995

Application of DOUBLE DECKER BUS)
TOURS W.D.C., INC., Trading as)
DOUBLE DECKER BUS WASHINGTON,)
D.C., for a Certificate of)
Authority -- Irregular Route)
Operations)

Case No. AP-95-21

By application filed March 31, 1995, Double Decker Bus Tours W.D.C., Inc., a District of Columbia corporation trading as Double Decker Bus Washington, D.C., seeks a certificate of authority to transport passengers, together with baggage in the same vehicles as passengers, in irregular route operations between points in the Metropolitan District.

Notice of this application was served on April 11, 1995, in Order No. 4567, and applicant was directed to publish further notice in a newspaper and file an affidavit of publication. Applicant complied. The application is opposed by Old Town Trolley Tours of Washington, Inc., WMATC Carrier No. 124, which requests an oral hearing.

SUMMARY OF EVIDENCE

The application includes information regarding, among other things, applicant's corporate status, facilities, proposed tariff, finances, and regulatory compliance record.

Applicant is under common control with WDC Sightseeing Tours, Inc. (WDC), which filed an application for WMATC operating authority in 1992, proposing the same service that applicant proposes. WDC withdrew its application before decision.¹ Applicant also is under common control with New York Apple Tours, which offers sightseeing tours in double-decker buses in New York.

Applicant's proposed tariff contains per capita rates for scheduled sightseeing service and hourly rates for unscheduled charter service. Applicant proposes commencing operations with six double-decker buses it has contracted to purchase from New York Apple Tours.² The purchase is conditioned on applicant obtaining the necessary

¹ In re WDC Sightseeing Tours, Inc., No. AP-92-33, Order No. 4051 (Feb. 8, 1993).

² The buses are currently registered in New York but will be inspected and registered in DC prior to their use in applicant's WMATC operations.

approvals to operate in DC, including approval from this Commission. Once those approvals have been obtained, New York Apple will deliver the buses to applicant in DC. Applicant, in turn, will execute a note for \$400,000 -- \$360,000 for the buses and \$40,000 in working capital. Repayment of principal is scheduled to commence at the end of applicant's third year of operation. In lieu of interest and in exchange for receiving consulting services from New York Apple, applicant will pay an annual fee of 3 percent of gross revenue commencing at the end of applicant's first year of operation. All payments are scheduled to terminate at the end of applicant's eighth year of operation.

Applicant filed a balance sheet as of March 14, 1995, showing cash of \$30,000, and equity of \$30,000. Applicant's projected operating statement for the twelve months ending August, 1996, shows tour revenue of \$1,704,403; expenses of \$1,589,452; and net income of \$114,950.

Appended to the application is a loan commitment in the form of a shareholder resolution wherein each of applicant's three controlling shareholders agrees to loan applicant up to \$50,000 on an as-needed basis.

Applicant certifies it has access to, is familiar with, and will comply with the Compact, the Commission's rules and regulations, and United States Department of Transportation regulations relating to transportation of passengers for hire.

DISCUSSION

This case is governed by the Compact, Title II, Article XI, Section 7, regarding applications for certificates of authority, and Article XII, Section 3, regarding applications for approval of common control. Protestant's request for oral hearing is governed by Commission Regulation No. 54-04(b).

I. Application for Certificate of Authority

Article XI, Section 7(a), of the Compact provides in relevant part that:

- . . . the Commission shall issue a certificate to any qualified applicant . . . if it finds that --
- (i) the applicant is fit, willing, and able to perform [the] transportation properly, conform to the provisions of this Act, and conform to the rules, regulations, and requirements of the Commission; and
 - (ii) that the transportation is consistent with the public interest.

An applicant bears the burden of establishing fitness and consistency with the public interest.³ Based on the information in the application, as described above, the Commission finds applicant has made its prima facie case.

Once an applicant has made its prima facie case, the burden shifts to protestant to contravene that showing, which includes demonstrating that protestant's operations will be endangered or impaired contrary to the public interest.⁴ The protest must be accompanied by all available evidence on which protestant would rely.⁵

A. Fitness.

The fitness inquiry focuses on an applicant's financial fitness, operational fitness, and regulatory compliance fitness.⁶

1. Financial Fitness.

Applicant must show the present ability to sustain operations during the first year under WMATC authority.⁷ Protestant asserts that more information is needed to make a finding on this issue. Further, protestant questions the enforceability of the shareholder loan resolution and challenges applicant's debt/equity ratio and ridership projections. Protestant relies on our decision in In re U.S. Shuttle, Inc., No. AP-88-13, Order No. 3229 (Sept. 13, 1988).

The record contains sufficient evidence for making a determination of applicant's financial fitness. The record shows that applicant has \$30,000 cash on hand, and is due an additional \$40,000 from New York Apple Tours upon final execution of the bus purchase contract.⁸ That \$70,000 matches the peak cumulative cash outflow

³ In re D.C. Ducks, Inc., No. AP-94-21, Order No. 4361 (Aug. 9, 1994); In re Seth, Inc., t/a Kids Kab, No. AP-93-40, Order No. 4243 (Feb. 9, 1994); In re Peter Pan Bus Lines, Inc., No. AP-93-19, Order No. 4149 (Aug. 11, 1993).

⁴ Order No. 4361 at 2; Order No. 4243 at 2; Order No. 4149 at 2.

⁵ Commission Regulation No. 54-04(a).

⁶ In re Battle's Transp., Inc., No. AP-85-12, Order No. 2722 (June 20, 1985).

⁷ In re WDC Sightseeing Tours, Inc., AP-92-33, Order No. 4036 (Jan 12, 1993).

⁸ Protestant's criticism of the valuation of the buses and terms of repayment is addressed below in the discussion of common control.

predicted by applicant during the first year of operations.⁹ The \$150,000 available from applicant's shareholders should cover any unstated start-up costs such as applicant's insurance deposit and the 7 percent excise tax payable upon registration of applicant's vehicles in DC.¹⁰

Commission precedent supports our acceptance of the shareholder resolution as evidence of applicant's financial fitness. In In re Easy Travel, Inc., No. AP-89-44, Order No. 3447 (Jan. 3, 1990), we found applicant financially fit in part on the ground that applicant had "a shareholder willing and able to infuse capital into the corporation if necessary." Id. at 5. In In re Airport Limo, Inc., No. CP-79-02, Order No. 2028 (Sept. 6, 1979), we relied on a parent corporation's resolution to cover the debts of its wholly-owned subsidiary to sustain a finding of the subsidiary's financial fitness. Moreover, this application is further supported by evidence that two of the shareholders have ready access to liquid funds in an amount exceeding the commitment assumed by all three.

Applicant's debt/equity ratio and ridership projections give us no pause for concern. Average ridership projections of eleven to seventeen riders per bus, per trip, depending on the month, do not strike us as unreasonable -- especially in light of applicant's access to a world-wide ticket distribution network¹¹ -- and considering that applicant's shareholders ultimately are the sole source of applicant's debt, we may rely on our numerous decisions finding highly-leveraged applicants fit where the principal creditors are controlling shareholders.¹²

Protestant's reliance on the U.S. Shuttle decision is misplaced. U.S. Shuttle was found financially unfit only after its projected first-year revenue was adjusted to conform with its own

⁹ Applicant's first-year projections show a peak cumulative loss from operations of \$77,082 after six months. Adjusting for management fees (which are not payable until the end of the year) and depreciation, the peak first-year cumulative cash outflow from operations is \$20,649. Adding applicant's estimated pre-operating expenses of \$50,000, yields a total peak first-year cash outflow of \$70,649. Applicant projects net cash inflows after the first six months.

¹⁰ D.C. CODE ANN. § 40-703(j)(1) (1990).

¹¹ See Affidavit of Hayim Grant at 3, ¶¶ 7, 12 (May 25, 1995) (First Affidavit).

¹² See In re A.C. Limo. Serv., Inc., No. AP-95-23, Order No. 4606 (May 31, 1995); In re The Airport Shuttle, No. AP-94-22, Order No. 4331 (July 6, 1994); In re M.R. Hopkins Transp. Servs., Inc., t/a M.R. Hopkins Transp., No. AP-94-03, Order No. 4265 (Mar. 28, 1994); In re Seth, Inc., t/a Kids Kab, No. AP-93-40, Order No. 4243 at 1 n.1 (Feb. 9, 1994); In re S&W Bus Serv., Inc., No. AP-93-15, Order No. 4103 (May 18, 1993); In re Sky Lines, Inc., No. AP-91-46, Order No. 3886 (Feb. 12, 1992).

ridership projections and average fare estimates. Applicant's revenue projections here are consistent with its ridership projections and stated fares.

2. Operational Fitness.

Protestant raises five operational fitness issues: whether applicant's passengers will be comfortable and safe riding in the upper deck of an open-air bus, whether applicant's vehicles can pass local inspection, whether applicant's vehicles will be properly stored, whether applicant's drivers will be qualified to operate applicant's vehicles and whether applicant will sell tickets aboard the vehicles.

Regarding the comfort and safety of passengers riding in the upper deck, applicant states:

When the weather does not permit the use of the top deck, the top deck will not be used.

The open-topped double-decker buses contain a high railing for safety precautions. In addition, the Double Decker operation requires that a tour guide station himself or herself on the second level of the bus to make sure that appropriate decorum is maintained.

As an additional safety precaution, each bus has a mirror situated so that the driver may have a view of the passengers on the second level, and the tour guide on the second level has the ability to signal the bus driver.

First Affidavit of Hayim Grant at 4, ¶¶ 19-21. These vehicles have all passed New York State inspection, as noted below.

With regard to local inspection of applicant's vehicles, in accordance with our normal practice, we will condition issuance of a certificate of authority to applicant on applicant's filing proof that its vehicles have passed safety inspection by the District of Columbia, the State of Maryland, the Commonwealth of Virginia or the United States Department of Transportation.

As for the proper storage of applicant's vehicles, it is reasonable to assume that applicant will adequately safeguard its assets, as would be expected of any prudent carrier. If the market is as competitive as protestant asserts, and we believe it is, it would be counterintuitive to suppose that applicant would allow its vehicles to deteriorate to a substandard level. Moreover, applicant's vehicles are subject to an annual inspection requirement under 49 C.F.R. § 396.17, which has been adopted by the Commission in Regulation No. 64.

With respect to the qualifications of applicant's drivers, applicant is obligated to enforce the driver qualification regulations in 49 C.F.R. Part 391, and given the unusual nature of applicant's

vehicles, we will require applicant to file with respect to each of its initial drivers a copy of a Certification of Road Test prepared in accordance with 49 C.F.R. § 391.31. Each certification shall show that the test was administered by applicant in applicant's double-decker buses. Moreover, we will require applicant to file copies of the commercial driver's licenses for those drivers.

Finally, as to whether applicant proposes selling tickets aboard its buses, applicant states that such sales will be handled by the tour guide so that the driver is not distracted.¹³

3. Compliance Fitness.

Protestant challenges applicant's compliance fitness in derivative fashion by questioning the compliance fitness of applicant's commonly-controlled affiliate, New York Apple Tours. The compliance fitness of a commonly-controlled carrier is relevant to a determination of an applicant's compliance fitness.¹⁴ Protestant's allegations of complaints against applicant's New York affiliate, although unsupported by affidavit, led staff to make inquiries into New York Apple Tours' compliance fitness. Staff has brought to our attention a Newsday article in which an official of the agency which licenses New York Apple, the New York City Department of Consumer Affairs (DCA), is quoted as saying New York Apple was cited in 1994 for operating buses without the necessary "safety certificates."¹⁵

Without denying the substance of the Newsday quote, applicant explains that DCA had been issuing sightseeing bus licenses for many years without requiring vehicle inspections as mandated by the City Code.¹⁶ The Newsday article supports this assertion. Applicant explains further that once DCA began enforcing that requirement, New York Apple sought inspection by the New York State Department of Transportation (NYSDOT).¹⁷ Some delay ensued. NYSDOT initially abjured jurisdiction and then needed time to become familiar with the

¹³ See First Affidavit of Hayim Grant at 5, ¶ 32.

¹⁴ See Order No. 4361 at 8 (in finding applicant fit Commission considered challenges against vehicles and operations of carrier allegedly under common control); cf. In re Miju Express, Inc., No. AP-91-36, Order No. 3865 (Dec. 19, 1991) (past conduct of corporate applicant's president relevant to determination of applicant's compliance fitness).

¹⁵ Ellis Henican, *IN THE SUBWAY Bus Lines In Double Trouble*, NEWSDAY, June 2, 1994, at A26.

¹⁶ See Affidavit of Hayim Grant at 1-2, ¶ 4 (July 14, 1995) (Second Affidavit).

¹⁷ See Second Affidavit of Hayim Grant at 2, ¶¶ 5-7.

English design of New York Apple's buses.¹⁸ Meanwhile, New York Apple apparently continued operating.

Given the commonality of ownership and control, this Commission is concerned that applicant might exhibit some of the same behavior. On the other hand, New York Apple's expenditure of more than \$100,000 to bring its buses into compliance¹⁹ demonstrates a tangible and contemporary commitment to safety on the part of applicant's owners/officers, and applicant will not be permitted to deploy any vehicles until they have passed inspection locally. On balance, a prospective finding of compliance fitness is warranted.

B. Public Interest.

Protestant argues that approval of the instant application would not be in the public interest because applicant's "weak financial condition can prove harmful to the public by bringing on competition that could result in the demise of undercapitalized [applicant] and harm to [protestant], ultimately leading to a reduced service to the sightseeing public."²⁰ While such an argument may be grounds for denying the application, protestant has failed to carry its burden of proof.

The burden on protestant is twofold. First, the protest must be accompanied by some evidence of the alleged harm to protestant.²¹ Second, the evidence must support a finding that the harm to protestant will result in harm to the public interest.²² The protest here is not supported by any evidence whatsoever, much less evidence of the impact a grant of authority would have on protestant. Without so much as an affidavit in support, protestant's allegations of harm are entitled to little or no weight.²³ Moreover, any grant of authority carries with it the potential for diverting some passengers from existing carriers to a new entrant; that is precisely why a protestant must allege more than a mere diversion of revenue.²⁴ At

¹⁸ See id. at 2-3, ¶¶ 8-10.

¹⁹ See id. at 2, ¶ 10.

²⁰ Protest at 8.

²¹ See In re Shaw Bus Serv., Inc., No. AP-85-25, Order No. 2819 at 14 (Feb. 4, 1986) (protest denied where protestants presented no financial evidence); Order No. 2722 at 9 (protest denied where no evidence presented from which to gauge adverse impact on existing carrier).

²² Order No. 2819 at 14; Order No. 2722 at 9.

²³ Order No. 4361 at 7 n.32; see Order No. 2722 at 9 (allegations of harm speculative where no evidence presented).

²⁴ Order No. 2819 at 13.

best, a simple diversion of revenue is all that may be inferred from the protest here.

Protestant's allegations of public harm suffer from the same evidentiary deficiency and rest on the faulty premises that applicant is financially weak and that no other carrier will step in to fill the void should applicant and protestant meet their demise. As indicated above in the financial fitness section we do not find applicant financially weak, and protestant acknowledges that it is but "one of many sightseeing carriers in the local market already facing stiff competition," that the market is served by "numerous other per capita and charter carriers."²⁵ As long as competition flourishes there is no need to protect individual competitors.

Granting the protest in this case would propel this Commission backward to the days of public convenience and necessity, when carriers were protected against encroachment on their service territories. Today, insulation from competition is presumed to be inconsistent with the public interest.²⁶ The protest fails to overcome that presumption.

II. Application for Approval of Common Control

Because applicant is under common control with New York Apple Tours, this case is governed by Title II, Article XII, Section 3, of the Compact,²⁷ which provides in pertinent part that a "carrier or any person controlling, controlled by, or under common control with a carrier shall obtain Commission approval to . . . acquire control of another carrier that operates in the Metropolitan District through ownership of its stock or other means." The Commission may approve such a transaction if it is consistent with the public interest. Id.

Prior to the 1990 amendment of the Compact, effective 1991, the public interest analysis in an acquisition through ownership of stock focused on the fitness of the acquiring party, the fairness of the purchase price, the resulting competitive balance, any dormancy of operating rights, the benefits to the riding public, and the interests of affected employees.²⁸ The purchase price and dormancy inquiries are no longer relevant under the amended Compact,²⁹ and the interests

²⁵ Protest at 7-8.

²⁶ Order No. 4243 at 4.

²⁷ Order No. 4361 at 8; Order No. 4149 at 3.

²⁸ D.C. CODE ANN. § 1-2414 (1992); Order No. 4361 at 8.

²⁹ The purchase price inquiry was necessary to prevent the acquired WMATC carrier from passing exorbitant acquisition costs on to captive customers in the form of rate increases. In re WestScot Ltd. Partnership & Conference Ctr. Interests, Inc., t/a Westfields Int'l Conference Ctr., No. AP-93-24, Order No. 4175 (Sept. 30, 1993). This ratemaking concern is no longer relevant under the Compact. Id. at

of affected employees are not an issue since applicant has no prior operations.

Analysis of the relevant remaining factors supports a finding here of consistency with the public interest. First, the acquiring parties in this case are applicant's controlling shareholders. Our current finding of applicant's fitness permits an inference of the acquiring parties' fitness.³⁰ Second, the evidence here indicates that applicant is not currently affiliated with any WMATC carrier. Certification of applicant, therefore, should not result in any consolidation of market power in the Metropolitan District. Third, the benefit to the riding public derives from the increased competition in sightseeing service that this application portends, which is presumptively in the public interest.³¹

III. Request for Oral Hearing.

A request for oral hearing must contain reasonable grounds showing good cause, including a description of the evidence to be adduced and an explanation of why it cannot be adduced without a hearing.³²

Protestant asserts that a hearing is required so that it may obtain through cross-examination information peculiarly within the knowledge of applicant regarding the following subjects: (a) applicant's financial position and plans, (b) applicant's proposed method of operations, (c) the condition and value of the buses to be purchased from New York Apple Tours, (d) the basis of complaints against New York Apple Tours, (e) the shareholders' ability to fulfill their loan commitment to applicant, and (f) applicant's relationship with Ensign bus.

We do not see the need for a hearing. Applicant has presented ample information concerning applicant's financial condition. Protestant does not challenge the accuracy of applicant's balance sheet showing \$30,000 in cash. The bus purchase contract speaks for itself and appears enforceable by applicant.³³ Protestant does not challenge the authenticity of the shareholder resolution and supporting shareholder investment account statement.

2-3. Hence, the Commission need not concern itself with the vehicle valuation issue raised by protestant.

³⁰ Order No. 4361 at 8.

³¹ Order No. 4361 at 8-9; Order No. 4243 at 3-4; Order No. 4149 at 3.

³² Commission Regulation No. 54-04(b).

³³ See Cauff, Lippman & Co. v. Apogee Finance Group, Inc., 807 F. Supp. 1007, 1020 (S.D.N.Y. 1992) (contract which specifies all material terms binding notwithstanding need for subsequent documentation to formalize agreement).

The request for hearing on applicant's proposed method of operations is too vague to constitute a showing of good cause.

With regard to the condition and value of the buses, local inspection of the buses will insure they are in acceptable condition; their value is irrelevant.

The issue of New York Apple Tours' fitness has been resolved in favor of applicant.

CONCLUSION

Based on the evidence in this record, the Commission finds applicant to be fit, willing, and able to perform the proposed transportation properly and to conform with applicable regulatory requirements. The Commission also finds that, subject to the aforementioned conditions, the proposed transportation and acquisition of control are consistent with the public interest.

THEREFORE, IT IS ORDERED:

1. That Double Decker Bus Tours W.D.C., Inc., trading as Double Decker Bus Washington, D.C., 2160 North Central Road, Fort Lee, NJ 07024, is hereby conditionally granted, contingent upon timely compliance with the requirements of this order, authority to transport passengers, together with baggage in the same vehicles as passengers, in irregular route operations between points in the Metropolitan District.


2. That applicant is hereby directed to file the following documents with the Commission: (a) evidence of insurance pursuant to Commission Regulation No. 58 and Order No. 4203; (b) an original and four copies of a tariff or tariffs in accordance with Commission Regulation No. 55; (c) an equipment list stating the year, make, model, serial number, vehicle number, license plate number (with jurisdiction) and seating capacity of each vehicle to be used in revenue operations; (d) evidence of ownership or a lease as required by Commission Regulation No. 62 for each vehicle to be used in revenue operations; (e) proof of current safety inspection of said vehicle(s) by or on behalf of the United States Department of Transportation, the State of Maryland, the District of Columbia, or the Commonwealth of Virginia; (f) for each initial driver, a copy of the driver's CDL and a copy of a Certification of Road Test prepared in accordance with 49 CFR § 391.31, showing administration of the test by applicant in applicant's double-decker vehicles; and (g) a notarized affidavit of identification of vehicles pursuant to Commission Regulation No. 61, for which purpose WMATC No. 314 is hereby assigned.

3. That upon timely compliance with the requirements of the preceding paragraph and acceptance of the documents required by the Commission, Certificate of Authority No. 314 shall be issued to applicant.

4. That applicant may not transport passengers for hire between points in the Metropolitan District pursuant to this order unless and until a certificate of authority has been issued in accordance with the preceding paragraph.

5. That unless applicant complies with the requirements of this order within 30 days from the date of its issuance, or such additional time as the Commission may direct or allow, the grant of authority herein shall be void and the application shall stand denied in its entirety effective upon the expiration of said compliance time.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS ALEXANDER, LIGON, AND SHANNON:



William H. McGilvery
Executive Director